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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 572

HAROLD MARSHALL COPELAND, *Petitioner*

versus

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALBERT S. LEWIS
Board of Trade Building
Norfolk, Virginia

GERALD F. WHITE
324 Carolina Building
Elizabeth City, N. C.

RUSSELL E. TWIFORD
Carolina Building
Elizabeth City, N. C.

Counsel for the Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Harold Marshall Copeland, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above entitled case on October 25, 1961.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not as of this date reported in the official or unofficial reports. The opinion of the United States Court of Appeals for the Fourth Circuit is hereto appended.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the District Court was entered on October 25, 1961. Upon application of the petitioner, and for good cause shown, the Court of Appeals on November 3, 1961, ordered that its mandate be stayed pending application of the petitioner in the Supreme Court of the United States for a writ of certiorari to the Court of Appeals. The jurisdiction of this Court is invoked under the provisions of 28 USCA, section 1254(1).

QUESTIONS PRESENTED

1. Did the Trial Court commit prejudicial error in allowing Government's witness Brown to testify over objection that Ralph Woodrow Wilson stated to him that he had contracted with Harold Marshall Copeland to furnish him sugar, this being hearsay evidence, in that the existence of a conspiracy may not be established by the ex parte declaration of an alleged conspirator made in the absence of his alleged co-conspirator? (See transcript, pages 11 and 12).

2. Did the Trial Court commit prejudicial error in allowing Government's witness Brown to testify over objection that Armstead Sharp stated to him that Harold Marshall Copeland was probably at the still or out gathering sugar, this being hearsay evi-

dence and there being at the time no independent evidence of the existence of a conspiracy between Harold Marshall Copeland and Armstead Sharp and in that the evidence of a conspiracy may not be established by the ex parte declaration of an alleged conspirator made in the absence of his alleged co-conspirator? (See transcript, pages 47 and 48).

STATUTE INVOLVED

"If two or more persons conspire, either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both." Title 18, USCA, Chapter 19, Section 371.

STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Petitioner was convicted of a conspiracy to violate the Internal Revenue Laws relating to distilled spirits and sentenced by the Court to imprisonment for a period of 40 months. The petitioner contends that the Trial Judge committed prejudicial error in admitting in evidence two statements which were offered to prove a conspiracy. The statements are set forth herein below verbatim.

Statement No. 1. On pages 11 and 12 of the transcript, the following appears, the Government's attorney examining witness Brown:

> "Q. Now, going back before we go any further, October 5, I wish you would just tell what con-

versation you had there with Ralph Wilson, and what he instructed you to do, and who to see.

A. There at the apartment—

Mr. Greene: Objection. He has been over that.

The Court: Objection overruled.

A. (Continuing) There at the apartment at Danville, Virginia, 608 Hughes Street, on the morning of the 5th of October when Ralph Wilson came to the apartment, there in the presence of myself, and Rooster Miller, Mr. Ralph Woodrow Wilson stated he had been to see Harold Copeland—

Mr. Greene: Objection.

The Witness: —and Bud White.

Mr. Greene: Objection to this as to defendants Copeland and White.

The Court: Objection overruled.

The Witness: He stated he had been to see these two men, and he had contracted with them to furnish them sugar.

Q. (By Mr. Holshouser) Which two men now, who are you talking about?

A. Mr. Wilson stated he had contacted Harold Copeland and Bud White.

Q. All right.

A. And he had an agreement with them to furnish them sugar at $12 per hundred pound bag, and jars at cost, and in return he would receive whiskey at $20 a case; that would be $6 to a case."

Statement No. 2. On pages 47 and 48 of the transcript the following appears, the Government's attorney examining the witness Brown:

"I went to the Copeland residence, and Copeland was not there; and so I went on out to the Armstead Sharp residence, which is about one mile south of Highway Number 158, and it is the second house south of the Mt. Moriah Church in Hertford County. It is about three miles west of Winton on state route number 1174.

"I went to this residence, and upon arriving there, I talked to Armstead Sharp. He came out of the house and got into my car; I asked him if he had seen Mr. White or Mr. Copeland; and Armstead Sharp is the gentleman sitting over there, and I asked him if he had seen Mr. White or Mr. Copeland, if he knew where they could be found.

"Mr. Greene: Objection.

"The Court: Objection overruled.

"The Witness: Armstead stated he didn't know exactly where they were at the time, but they had been there earlier at his residence on this day, and he stated that they were probably at the still or out gathering sugar.

"Mr. Green: Object to that.

"The Court: Objection overruled."

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioner was indicted for alleged violation of the conspiracy statute hereinbefore quoted, to wit, 18 USCA, Chapter 19, Section 371.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

At the time this testimony was elicited from witness Brown there was no independent evidence of the existence of a conspiracy between petitioner and Ralph Woodrow Wilson and there is no evidence of the existence of a conspiracy on October 5, 1960, the date to which the testimony relates, and there was no independent evidence of the existence of a conspiracy between petitioner and Armstead Sharp when the recited testimony was elicited from witness Brown.

In *Bartlett et al.* v. *United States*, Tenth Circuit, 166 Fed. 2d 920, at page 924, the following appears:

"However, to render evidence of the acts or declarations of an alleged conspirator admissible

against an alleged co-conspirator, the existence of the conspiracy cannot be established against an alleged conspirator by evidence of the acts or declarations of his alleged co-conspirators, done or made in his absence. The acts or declarations of a conspirator, prior to the formation of the conspiracy or after its termination are not admissible against his co-conspirators."

The same principle of law is enunciated by Judge Learned Hand in *United States* v. *Nardone et al.* (Second Circuit) 106 Fed. 2d 41, at page 42.

In *May and Garson* v. *United States* (U. S. Court of Appeals of D. C.) 175 Fed. 2d 994, at pages 1007 and 1008, it is said:

> "The rules are that one defendant's connection with a conspiracy cannot be established by the acts or declarations of other defendants in his absence, and that a defendant cannot be bound by the acts or declarations of other defendants until (a) the conspiracy has been established and (b) the defendant's participation in the conspiracy has been established."

Also, see *Hauger* v. *U. S.* (W. Va. 1909) 173 Fed. 54, where it was held that the declarations of an alleged co-conspirator to a witness were inadmissible to prove the existence of the conspiracy as against another party thereto. In *Mayola* v. *United States* (Ninth Circuit) 71 Fed. 2d 65, at page 67, it is said:

> "There is another reason for the rejection of this testimony. It is held, in Kuhn v. U. S., 26 F. (2d) 463 (C.C.A. 9), that the declarations of one co-conspirator to another are not competent to establish the connection of a third person with the conspiracy. This is followed in Minner v. v. U. S., 57 F. 2d 506, 511 (C.C.A. 10), and again by the same circuit in Thomas v. U. S. (C.C.A.) 57 F. (2d) 1039, 1041. The Circuit Court of Ap-

peals for the Sixth Circuit, in Nibbelink v. U. S., 66 F. (2d) 178, 179 following, but not citing, Pope v. U. S., 289 F. 312, 315 (C.C.A. 3), and Kelton v. U. S., 294 F. 491, 495 (C.C.A. 3), says: '. . . Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made.' "

CONCLUSION

It is respectfully submitted that the testimony particularized is nothing more than hearsay evidence, and such evidence is not competent to prove the existence of a conspiracy. The first statement recited related to October 5, 1960. The second statement recited related to October 15, 1960. There was no independent evidence of the existence of the conspiracy as of October 5, 1960, and there was no independent evidence of the existence of the conspiracy with Armstead Sharp as of October 15, 1960. It is therefore respectfully petitioned that a writ of certiorari be granted.

Respectfully submitted,

ALBERT S. LEWIS
Board of Trade Building
Norfolk, Virginia

GERALD F. WHITE
324 Carolina Building
Elizabeth City, N. C.

RUSSELL E. TWIFORD
Carolina Building
Elizabeth City, N. C.

Counsel for the Petitioner